

SHADE CALLOWAY.

[To accompany bill H. R. No. 586.]

DECEMBER 12, 1856.

Mr. E. B. WASHBURNE, from the Committee on Commerce, made the following

REPORT.

The Committee on Commerce, to whom was referred the petition of Shade Calloway, claiming compensation for work done under contract on the Tennessee river, having had the same under consideration, submit the following report :

On the 16th September, 1853, the petitioner made a contract with Brevet Lieutenant Colonel J. McClellan, topographical engineers, then in charge of the improvement of the Tennessee river, for the construction of a dam at the head of Ross' island, to be two feet high and 200 yards long, for which he was to be paid the sum of \$1,500. The dam was to be completed by the 30th November, 1853, "if the high water does not prevent."

The contractor commenced work on the dam, but the high water prevented its completion during the fall of 1853. In the following summer, as soon as the condition of the river would permit, he resumed the work, and constructed one hundred and eighty yards of the dam, in strict compliance with the terms of the contract. At this stage of the work, in August, 1854, Colonel McClellan ordered it to be suspended, for the reason that the appropriation made by Congress was not sufficient to complete it.

Colonel McClellan died on the 1st September, 1854, without having reported to the department the condition of the work done under the said contract; the Secretary of War appointed R. W. W. Byrd, who had been an assistant under Colonel McClellan, to take charge of and close "the accounts and affairs connected with the improvement of the Tennessee river." This officer duly approves and certifies the petitioner's account for \$1,350, which is the proportional amount due for the work done in pursuance of the contract. This certificate is appended to this report.

The affidavits of Samuel C. Davis, James Lewelling, John Long, and John Finley, fully prove the faithful execution of the work according to the terms of the contract; and the official certificate of Mr. Byrd, and the testimony of J. E. S. Blackwell, one of the commis-

sioners of the United States appointed for this very work, establishes the fact that no payment was made to Calloway, or to any other person for him. But this latter fact also sufficiently appears in the accounts of the work, for it is not claimed that any payment was made.

The committee also append the letter of the Third Auditor of the Treasury, dated 19th November, 1855, in which all the material facts of the case are admitted, but in which the certificate of the agent of the United States, R. W. W. Byrd, is discredited, because not sworn to, and for the reason that Colonel McClellan's reports to the department do not give information of this particular part of the work under his charge. This omission, however, is fully accounted for by the sudden death of that officer, which took place very soon after he had ordered the work to be suspended. But the objections of the auditor are based chiefly upon the absence of proof, and it is due to him to state that the affidavits hereunto appended were not before him, as their dates will show.

It is apparent, from the Auditor's letter, that the condition of the appropriation fully justified the contract at the time the latter was made, and during the progress of the work. The contractor had no means of ascertaining the condition of the funds, and perhaps even the officer in charge himself could not accurately proportion the different parts of the improvement to the sum in hand; but there can be no good reason why this bill alone should remain unpaid.

The committee are of opinion that the claim of the petitioner is established beyond all controversy, and they, therefore, report a bill for his relief.

"The United States to Shade Calloway.....DR.

("On account of Tennessee river improvements.)

"For building one hundred and eighty yards of dam at
Ross' island, in Tennessee river..... \$1,350 00"

I certify that the above account is correct; that the sum, thirteen hundred and fifty dollars, is the proportionate value of above work, Shade Calloway having contracted to build a uniform dam two hundred yards in length for fifteen hundred dollars; that the work was discontinued by order of Lieutenant Colonel Captain McClellan in charge; that above work is done agreeable to articles of contract, and that the sum of thirteen hundred and fifty dollars is due Shade Calloway on account of above.

R. W. W. BYRD,
Agent for United States.

[See report on this claim made to the Secretary of War on the 19th of November, 1855.]

Contract entered into this day between Shade Calloway, of Knox county, Tennessee, of the first part, and Lieutenant Colonel J. McClellan, agent of the United States of the second part.

I, Shade Calloway, of the county and State aforesaid, agree and contract to build a dam at the head of Ross' island in the Tennessee river, the said dam to be two (2) feet high and two hundred (200) yards long, and in case a greater length and height are found to be necessary, then the additional length and height to be built at the same rate; the dam to be built of straight logs, two-thirds white or post oak, and one-third pine or poplar; the ties to be of white or post oak; the timber to be framed as the superintending engineers may direct, and the dam to be filled with rock to the top of the timber; large rock to be laid next to the timber facing the current of the river, and the upper layer of rock to be of Mary rock; the timbers to be fastened together by locust pins twenty-two inches long and two inches in diameter; the dam to be completed by the 30th of November, 1853, if the high water does not prevent it; in consideration of which, I, John McClellan, agent as aforesaid, the work being done according to the requirements above, bind myself to pay to the said Calloway the sum of fifteen hundred dollars; in testimony of which we hereunto affix our hands and seals this 16th day of September, 1853. I furnish the timber.

SHADE CALLOWAY, [SEAL.]
J. McCLELLAN, [SEAL.]

Witnesses: JAMES COX.
F. A. CHAPMAN.

Directions for building dams on Tennessee river.

1st. No timber will be used that is not of the following dimensions and kinds.

The string or side pieces to be twelve inches in diameter at the smallest end, two-thirds of white or post oak and one-third pine or poplar.

The ties to be eight-feet long and six inches in diameter at the smallest end.

All the timber to be straight, and free from wind shakes.

2d. Framing the timber and putting it together.

The trenails for the ties will be cut in the side pieces at distances of six feet from centre to centre, they will be six inches wide on the outside of the side pieces, and five inches wide on the inside, and they will be five inches deep. The necks of the ties will be cut to fit the trenails tight enough to require to be driven into them with a heavy sledge.

The side pieces will be so laid that the middle of the logs in the upper tier shall be over the cap or joints of the tier below. The side pieces will have caps of eighteen inches, and through each cap there will be driven two pins of seasoned white oak two inches in diameter and twenty-two inches long.

The side pieces will be fastened together with seasoned white oak pins, two inches in diameter and twenty-two inches long, driven into them at distances of five feet from each other.

The side pieces will be laid the small end of one and but of the one above it together, and if they do not fit closely, then they will be hewed to fit closely.

3d. Heavy rocks will be selected to fill the cribs, the largest will be laid against the face of the dam next the current, the top of the dam will be covered with large rock, none of which will project more than six inches above the top of the timber, the upper ties being covered with rock. There will be small green brush intermixed with the rock, and the intervals between the large rock on the top of the dam will be filled with small rock.

The foregoing directions will be strictly observed.

J. McCLELLAN,
Bvt. Lieut. Col., Capt. Top. Engineers.

The dam to be two feet high and two hundred yards long, and in case a greater length or height is proved to be necessary, then the length or height to be built at the same rate.

STATE OF TENNESSEE, }
Knox county, } ss.

J. E. S. Blackwell, a credible witness, whose evidence would be taken in any court of justice in the State aforesaid, personally appeared before me, an acting justice of the peace of and for the county and State aforesaid, and made oath, in due form of law, that he was one of the commissioners appointed by the government of the United States, under Colonel John McClellan, in the improvements of the Tennessee river, in the years 1853-'54, under an act of Congress passed in 1853, and continued as such commissioner until the said improvements were abandoned by the said McClellan for want of funds. Affiant further states that the said McClellan made a contract, in the name of the United States government, with one Shade Calloway, for the improvement of said Tennessee river at Ross' island, for which he, the said McClellan, did not pay the said Calloway nor any other person, for the reason that the said McClellan was out of funds, (the word *island* interlined before signed.)

J. E. S. BLACKWELL.

Sworn to and subscribed before me, this 28th day of March, 1856.

ZAC. BOOTHE,
Justice of the peace for Knox county, and State of Tennessee.

STATE OF TENNESSEE, }
Knox county, } ss.

I, George M. White, clerk of the county court of Knox county, certify that Zac. Boothe, whose name appears to the within affidavit, was, at the time of signing the same, an acting justice of the peace for Knox county, and that full faith and credit are due to all his acts as such, and being well acquainted with said justice, I believe the within signature to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office this 28th day of March, 1856.

GEORGE M. WHITE, [L. s.]
Clerk of Knox county court.

STATE OF TENNESSEE, }
Knox county, } ss.

I, Thomas Rodgers, chairman of the county court of Knox county, certify that George M. White, whose name appears to the above certificate, was, at the time of signing the same, clerk of the county court of Knox county, and that full faith and credit are due to all his acts as such.

Given under my hand this 29th day of March, 1856.

THOMAS RODGERS,
Chairman of Knox county court.

STATE OF TENNESSEE, }
Sevier county, } ss.

I, B. M. Chandler, clerk of the county court of Sevier county, do hereby certify that James M. Evans, whose genuine signature appears to the foregoing affidavit, is and was, at the time of signing the same, an acting justice of the peace for said county, duly sworn and commissioned, and that all of his acts are entitled to full faith and credit.

Given under my hand and private seal, having no seal of office, this 5th day of April, 1856.

B. M. CHANDLER, *Clerk*, [L. s.]

STATE OF TENNESSEE, }
Sevier county, } ss.

I, Morgan Davis, chairman of the county court of Sevier county, do certify that B. M. Chandler, whose name appears to the foregoing certificate, is clerk of said county court, and was at the time it bears date.

Given under my hand and seal this 5th day of April, 1856.

MORGAN DAVIS,
Chairman of Sevier county court.

STATE OF TENNESSEE, }
Sevier county, } ss.

Personally appeared before me, an acting justice of the peace of and for the county and State aforesaid, Samuel C. Davis and James Lewelling, creditable witnesses, known to be so by me, whose evidence would be received in any court of justice, and made oath, in due form of law, that in the month of October, 1853, they were working with one Samuel Pickins putting a dam in the Tennessee river at Ross' island, under a contract made by one Shade Calloway with Lieutenant Colonel John McClellan, on the part of the United States. Affiants further state that in the latter part of the month of October, 1853, the said Pickins was compelled to suspend any further work on said

dam, by reason of a rise of the Tennessee river, which continued too high to operate on said works the remainder of the season.

SAMUEL C. DAVIS,
JAMES LEWELLING.

Sworn to and subscribed before me, this 31st day of March, 1856.

JAMES M. EVANS,
Justice of the peace for Sevier county.

STATE OF TENNESSEE, }
Sevier county, } ss.

Personally appeared before me, an acting justice of the peace of and for the county and State aforesaid, John Finley and John Long, two creditable witnesses, whose evidence would be taken in any court of justice, and made oath, in due form of law, that they were employed and working with one Samuel Pickins at building a dam in the Tennessee, at the head of Ross' island, in the Tennessee river, under a contract made by one Shade Calloway with Lieutenant Colonel John McClellan, on behalf of the United States government. Affiants further state that they have carefully examined a copy of said contract, now before them, marked B, and the instructions of the said McClellan, marked C; that said dam was built and completed according to said instructions and contract to the extent of one hundred and eighty yards, when the further prosecution of said work was suspended by said McClellan for want of funds; that was in the month of August, 1854.

JOHN LONG,
JOHN FINLEY.

Sworn to and subscribed before me, this 1st day of April, 1856.

J. M. EVANS,
Justice of the peace for Sevier county.

TREASURY DEPARTMENT,
Third Auditor's Office, November 19, 1855.

SIR: A communication to you, dated September 29, 1855, from Messrs. Stanton & Walker, attorneys, relative to an account of Shade Calloway, of Tennessee, for building a dam at Ross' island, in the Tennessee river, having been referred by you on the 29th of September to this office for report, I have the honor, in reply, to submit the following:

By a contract entered into with Brevet Lieutenant Colonel J. McClellan, topographical engineers, dated September 16, 1853, and which is on file in the office of the Second Comptroller, Shade Calloway stipulated to build a dam two feet high and two hundred yards long at the head of Ross' island, in the Tennessee river, to be completed by

November 30, 1853, if the high water should not prevent it; the materials to be used in the construction of said dam, and the manner in which it was to be built, being described in the contract; and for which he was to receive the sum of fifteen hundred dollars, (\$1,500,) provided the work should be done according to the stipulated requirements.

Colonel McClellan died September 1, 1854, nine months after the above work was to have been completed. His accounts and affairs connected with the works for improvements in the navigation of the Tennessee river were, by the authority of the Secretary of War, placed in charge of R. W. W. Byrd, a clerk and assistant engineer who had been in his employ, in order to be closed; and on December 20, 1854, Mr. Byrd, it appears, transmitted to the Topographical Bureau, whence it was subsequently sent to this office, an account of the said Calloway "For building 180 yards of dam at Ross' island, in Tennessee river, \$1,350;" twenty yards less being charged for than the number of yards stipulated to be built. Mr. Byrd certifies that the account is correct, that the work was done agreeable to the articles of contract, that it was discontinued by order of Lieutenant Colonel McClellan in charge, and that the above named sum is due to the said Calloway on account of the work referred to.

It is not stated at what time, or for what reason, the order was given for the discontinuance of the work. It will be seen, however, that by the terms of the contract the dam was to have been completed, if not prevented by high water, by November 30, 1853, (about two and a half months after the date of the contract,) which renders it probable that the part claimed to have been built was completed prior to the date above mentioned; but if not, it should have been finished in the spring or early part of the summer thereafter—the accounts of Colonel McClellan indicating that other works on the same river were resumed in the latter part of May, 1854. This work, then, must have been discontinued either in the fourth quarter of 1853, or second quarter of 1854; for to suppose a date later than the last mentioned would involve the supposition that the terms of the contract relative to the time specified for the completion of the dam had been disregarded by the claimant. Why, then, was this account not paid when the order was given to stop the work.

By a reference to the accounts of Colonel McClellan, it is found that of the funds appropriated for improvements in the navigation of the Tennessee river, he had on hand at the beginning of the fourth quarter of 1853, the sum of \$3,061 31, and that, in addition thereto, he received during the quarter from the treasury the sum of \$12,399 00—making a total of \$15,459 31; of which he expended in the same quarter \$14,620 47—leaving in his hands at the close of the fourth quarter of 1853, \$838 84. In the second quarter of 1854 he received from the treasury \$8,841 00, making, together with the balance in his hands, \$9,679 84; of which he expended during the same quarter \$6,170 71—leaving on hand, at the beginning of the third quarter of 1854, an unexpended balance of \$3,509 13. Subsequently he received from the treasury \$3,183 00 on the 25th of July, and on the 14th of August thereafter the balance of the appropriation, amount-

ing to \$2,508 00—making, with the balance on hand at the beginning of the quarter, \$9,200 13. Of this amount \$8,543 27 appears to have been disbursed prior to his death on September 1, 1854—leaving an apparent balance of \$756 86 unexpended.

From the foregoing it is evident that, if the order for the discontinuance of the work in question was given either in the fourth quarter of 1853, or in the second quarter of 1854, Colonel McClellan had then on hand sufficient means to have made payment therefor. At the close of the second quarter of 1854 he had on hand more than \$3,000; and in the latter part of July next thereafter, he received a further sum of more than \$3,000; and about the middle of the succeeding month (August) a still further sum of \$2,508; and with the means thus at his disposal, it is not understood why he should have omitted to pay this account, if the terms of the contract had been complied with so far as permitted by himself. It is true that the funds referred to were afterwards nearly all expended; but this liability being incurred under a contract made in 1853, must, therefore, have been foreseen; and if the amount had been considered as justly due, it seems reasonable to conclude that Colonel McClellan would have so shaped the expenditures for other works as to have enabled him to reserve a sufficiency for its payment from the funds applicable to that purpose.

In a letter to Colonel J. J. Abert, Topographical Bureau, dated August 10, 1854, Colonel McClellan, after referring to the failure of the river and harbor bill, says: "I have directed the payment and discharge of all the hands from the work. The claims of part of last month, part of which are yet unpaid, and of this month, will take up the balance of the appropriation." And he adds, that he hopes, by a sale of the property on hand, to be able to finish the dams at Chota and Cancy creek. From the above language, it would appear that the claims for a part of July and those for August, up to the date of the letter above adverted to, were all that then remained unpaid; that the balance of the appropriation remaining unexpended would be sufficient for their payment, and that the amount which could be derived from a sale of the property on hand, not being required to meet liabilities already contracted, would be used to finish the dams at Chota and Cancy creek. Now, this claim must, if just, have been known at that time to Colonel McClellan, yet he does not appear to have been aware of its existence.

Agreeably with the intention indicated in the foregoing communication, Colonel McClellan appears to have discharged and paid the hands employed on the various works of which he was in charge, in the early part of August; but the sale of the property was not made till after his death, when it was sold by Mr. R. W. W. Byrd, amounting, per his acknowledgments, to \$871 25, and which appears to have been expended by him. This, with the balance of the appropriation shown to be unexpended per Colonel McClellan's accounts, would have been more than enough to pay the amount of the present claim. As shown by his letter of that date, Colonel McClellan knew as early as the 10th of August that no further appropriation could be obtained; and if this work had, as claimed, been performed in accordance with the

stipulations of the contract, why did he propose to use the sum expected to be obtained from sales of public property in finishing the dams at Chota and Cancy creek, when the dam built at Ross' island remained unpaid for? In reply to an inquiry from this office, Colonel J. J. Abert, chief of Topographical Bureau, states under date of the 14th instant: "We have no information in relation to this work, except what is derived from the contract already communicated to the Treasury Department. Nor are we able, from the letters of Lieutenant Colonel McClellan, to find why the work was discontinued, or why the account was not paid. The account in this case not being known to this office until after the death of Lieutenant Colonel McClellan."

It appears, then, that if the terms of the contract under which this claim arises were adhered to by the claimant, the order for the discontinuance of the work claimed to have been done must have been given at a time when Col. McClellan had ample means to have paid for it; and the fact that he did not do so, renders it probable that he did not regard the claim as being just; and if discontinued at a date so late that there were not sufficient funds left to pay the amount, it shows that the work had not progressed as rapidly as required by the contract, and that, in this particular at least, its stipulations had not been complied with—a strong presumption, in either case, being created against the justness of the claim—especially when taken in connexion with Col. McClellan's silence respecting it. The grounds upon which it rests at present are the contract and the certificate of Mr. Byrd. But a contract can furnish no evidence that its stipulations have been executed; and the testimony of Mr. Byrd cannot be admitted as evidence, except in the form of an affidavit, inasmuch as he is not a commissioned officer, nor, it is believed, at the time the said certificate was given, was he acting under the obligations of an oath.

In view of the foregoing considerations, and of the circumstances under which this account has been presented, it is my opinion that full and satisfactory evidence should be required showing the time when the dam, so far as claimed to have been built, was completed; that it has been carefully inspected, and that the materials used, and the manner of its construction, were in accordance with the requirements of the contract. And if it shall ultimately be decided to pay the amount, an appropriation for that purpose will be necessary, all the funds applicable thereto having been drawn from the treasury.

The communication of Messrs. Stanton and Walker is herewith returned.

Very respectfully, your obedient servant,

ROBERT J. ATKINSON,
Auditor.

HON. JEFFERSON DAVIS,
Secretary of War.

The Commission of the Land Office, in answer to a resolution of the Senate, passed April 18, 1854, has the honor to acknowledge the receipt of your report, and to inform you that the same has been forwarded to the proper authorities for their consideration. The report contains a full and complete statement of the progress of the Land Office during the year, and of the various measures which have been taken to improve the management of the public lands. It also contains a statement of the amount of the public debt, and of the various measures which have been taken to reduce the same. The report is a valuable and interesting document, and it is hoped that it will be of service to the public.

Very respectfully,
JOHN A. STANTON,
Commissioner of the Land Office.